IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 9575 OF 2004

RAMDEV MUNESHWAR SHARMA
(since deceased) through his legal heir
Smt. Sonmatidevi Ramdev Sharma .. PETITIONER

Vs.

VISHWAS RAGHUNATH PATIL
(Since deceased) through his legal heirs
Smt. Chhaya Vishwas Patil & Ors. ... RESPONDENTS

Mr. S. B. Shetye for petitioner

Mr. R. S. Apte with M. S. Lagu for respondent 2

CORAM:-SMT. RANJANA DESAI, J.

DATED:-26/4/2005

P.C.

Petitioner is the original defendant. The suit came to be filed by the landlord for eviction of the petitioner on the ground of change of user, default in payment of rent, bonafide requirement, unauthorised construction of permanent nature and acquisition of suitable alternate accommodation. The trial court decreed the suit on the ground of default in payment of rent

and acquisition of suitable alternate accommodation. An appeal was carried from the said judgment. The appellate court by its judgment and order dated 14/1/01 partly allowed the appeal. The appellate court held that the plaintiff had not proved the case of acquisition of suitable alternate accommodation. However, the plaintiff had proved that the defendant was a defaulter.

2. A writ petition was filed challenging the said judgment and order. By its judgment and order dated 16/1/04 this court remanded the matter to the Additional District Judge for reconsideration. After remand the appellate court returned the finding that the defendant is not a defaulter but held that the plaintiff had proved that the defendant had acquired suitable alternate accommodation and thus the plaintiff is entitled to the suit premises. This judgment and order is challenged in this writ petition.

3. I have heard at considerable length Mr. Shetye, the learned counsel appearing for the petitioner. He contended that no doubt the High Court by its judgment and order dated 16/1/04 remanded the case to the appellate court, however, it was wrong on the part of the appellate court to reopen the entire matter. He submitted that earlier the appellate court had confirmed the decree only on the ground of default in payment of rent. The writ petition was preferred only challenging that finding. The appellate court had held that the plaintiff had not proved its case that the defendant had acquired suitable alternate accommodation. Obviously,

therefore, when the High Court remanded the matter the appellate court was expected to only focus its attention on the question of default in payment of rent. The appellate court erred in going into the question of acquisition of alternate accommodation and, therefore, on that count the impugned judgment and order must be set aside.

4. I am unable to agree with the learned counsel. Firstly in paragraph 6, of the judgment the High Court has observed that the learned counsel appearing for the respondent i.e. the petitioner herein had stated that he had no objection if the matter is remanded to the Additional District Judge for reconsideration. The High Court had not remanded the matter with a direction that after remand the appellate court was only to concentrate on the question of default in payment of rent. Assuming for a moment that it is so, it was the duty of the counsel appearing for the defendant to point out to the appellate court that on remand only question of default in payment of arrears of rent should be considered. The impugned judgment does not indicate that the learned counsel appearing for the defendant made any such submissions. It appears that no objection was raised. In fact the learned counsel for the defendant has argued the case on acquisition of suitable alternate accommodation also. The impugned order indicates that judgments have been cited and the appellate court has considered this question in the light of submissions advanced by both

sides. It is, therefore, not open to the learned counsel for the defendant to contend that the impugned order should be set aside on this count.

5. So far as acquisition of suitable alternate accommodation is concerned, in my opinion, there is unassailable finding of fact against the defendant. The learned counsel for the petitioner urged that the commissioner's report was not considered. He drew my attention to the judgment of the lower appellate court dated 16/1/2000 in Civil Appeal No. 85 of 1995 (prior to the remand) where there is a reference to the commissioner's report. It is observed that on perusal of the same it transpires that in addition to a house a shed has been erected in the Municipal house No. 1697 and the shed is re-numbered as 1697 A. In addition to the abovesaid shed, there is a construction admeasuring 24 x 24 feet. It is further observed that the cut wood and furniture appears to have been stored in the said structure. It is further observed that it has not come on record whether other facilities such as electric connection, water connection etc. are available over there. Therefore, on the basis of the commissioner's report, it was held that House No. 1697 and 1697 A, cannot be held to be suitable for the residential purposes. The learned counsel urged that the appellate court was in error in not considering this aspect after the appeal was remanded. I am unable to agree with the learned counsel. It must be remembered that the judgment and order dated 16/1/2000 was set aside by this court and the

matter was remanded. This court observed that the matter needs reconsideration. Therefore, that judgment cannot be looked into for any purpose.

6. So far as the plaintiff's case of acquisition of suitable alternate accommodation by the defendant is concerned, that case is clearly made out. Sale deed Exh. 111 shows that the property purchased thereunder in the name of defendant's wife was not used for any business. Therefore, this property was available for the defendant for his residence. The trial court has observed that the defendant has admitted that he was residing with his wife and children. There is no evidence on record to establish that the defendant's wife had any independent income. Therefore, it is obvious that this property is purchased out of the defendant's income. Morever from the description of this property it is evident that it is a big house as compared to premises admeasuring 900 sq. feet which are in possession of the defendant for residence.
7. So far as alleged nonsuitability of the alternate accommodation is concerned the defendant ought to have adduced evidence in that behalf. He has not proved nonsuitability. For that he cannot merely refer to the commissioner's report particularly when the lower appellate court's judgment in which reliance is placed on it is set aside by this court.
8. In view of this, the lower court as well as the lower appellate court can not

be faulted for having taken a view that the defendant has acquired suitable alternate accommodation. The petition in the circumstances is dismissed.

9. At this stage the learned counsel for the petitioner states that the operation of the impugned order be stayed for eight weeks. In the circumstances of the case operation and execution of the impugned order is stayed for a period of eight weeks on the petitioner and every member of his family filing usual undertaking in this court within a period of six weeks from today.

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